IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

TERRY LYNN DILL — PLAINTIFF

vs. — No. 1:99CV207-D-D

SAVE-A-LOT, LTD. — DEFENDANT

OPINION

Presently before the court is the Defendant's motion for summary judgment. Upon due consideration, the court finds that the motion should be granted.

A. Factual Background

The Plaintiff, Terry Dill, was employed by the Defendant, Save-A-Lot, beginning in September of 1997, when he was hired as a grocery store co-manager. After brief stints at Save-A-Lot's Tupelo and Houston locations, Dill was permanently assigned to Save-A-Lot's Amory store in February of 1998 and was promoted to store manager about a month later.

On March 20, 1998, Dill fell out of a truck while at work and injured his knee. In May of 1999, Dill sought treatment for his knee injury; he underwent knee surgery on May 24, 1999 and, as a result of the surgery, was expected to be away from work for four weeks. Then, on June 4, 1999, Save-A-Lot terminated Dill's employment for, *inter alia*, "scheduling elective surgery and planning to leave store for extended period of time without notifying district or division manager to ensure management coverage of the store."

On July 9, 1999, Dill filed this suit, asserting the following federal claim and two state law claims:

(1) violation of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 - 2654 (FMLA), because he was fired, in part, because he took necessary medical leave;
(2) discharge in violation of public policy; and
(3) breach of various provisions contained in Save-A-Lot's employee handbook.

On June 8, 2000, Save-A-Lot moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

B. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden then shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e).

While all legitimate factual inferences must be viewed in the light most favorable to the non-movant, Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

C. Discussion

1. Dill's FMLA Claim

Under the provisions of the FMLA, an eligible employee is entitled to a total of twelve workweeks of leave during any twelve month period "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). It is unlawful for any employer to deny the exercise of any right provided for under the FMLA. 29 U.S.C. § 2615(a)(1).

Before a plaintiff may state a cause of action under the FMLA, however, two prerequisites

must be met. First, the defendant employer must meet the statutory definition of "employer"under 29 U.S.C. § 2611(4)(A). This requirement states that an employer must be engaged in interstate commerce and have a total of at least fifty employees. Save-A-Lot admits that it is a qualifying employer under the FMLA. Second, the plaintiff must be an "eligible employee" under 29 U.S.C. § 2611(2). The term "eligible employee," however, does not include:

> any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by the employer within 75 miles of that worksite is less than 50.

29 U.S.C. § 2611(2)(B)(ii). It is this exclusion that renders Dill's FMLA claim meritless; he does not qualify as an eligible employee under the FMLA and cannot state a claim under the FMLA.

Dill was employed at Save-A-Lot's Amory, Mississippi, worksite. Only two other Save-A-Lot worksites, located at Tupelo and Houston, are located within seventy-five miles of Amory. Combining all three stores together, it is undisputed that Save-A-Lot, as of May 22, 1999, employed less than fifty employees within seventy-five miles of the Amory store. See Gazda v. Pioneer Chlor Alkali Co., Inc., 10 F. Supp. 2d 656, 674 (S.D. Tex. 1997) (pertinent inquiry is number of employees employed within seventy-five miles of plaintiff's worksite when plaintiff's need for leave arose). In fact, Save-A-Lot employed only thirty-one workers at all three store locations combined. Dill, therefore, is not an "eligible employee" under the FMLA and cannot establish a FMLA claim.

Dill argues that Save-A-Lot employed more than thirty-one individuals between all three store locations. He argues that there are ten to twelve Save-A-Lot truck drivers whom should be included in the employee count. Even assuming, *arguendo*, that those truck drivers are included, their inclusion only brings Save-A-Lot's employee count to a maximum of forty-three employees, still short of the required fifty.

In sum, the court finds that Dill is not an eligible employee under the FMLA and cannot establish this essential element of his case. See Celotex, 477 U.S. at 322 (if nonmoving party fails to make sufficient showing on essential element of its case, moving party is entitled to summary judgment). As such, no genuine issue of material fact exists with respect to Dill's FMLA claim and

Save-A-Lot is entitled to summary judgment.

2. State Law Claims

Having dismissed the claims over which it has original jurisdiction, the court declines to exercise supplemental jurisdiction over Dills's state law claims. See 28 U.S.C. §1367(c). Therefore, the court shall dismiss Dill's state law claims without prejudice.

A separate order in accordance with this opinion shall issue this day.

This the ____day of August 2000.

_____
United States District Judge

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SAVE-A-LOT, LTD., DEFENDANT

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

(1) the Defendant's motion for summary judgment (docket entry 40) is GRANTED;

(2) the Plaintiff's federal claims are DISMISSED WITH PREJUDICE;

(3) the Plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE; and

(4) this case is CLOSED.

All memoranda, depositions, declarations and other materials considered by the court in ruling on this motion are hereby incorporated into and made a part of the record in this action.

SO ORDERED, this the ____day of August 2000.

_____
United States District Judge